Supreme Court, U. S.
FILED
APR 30 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1979

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NO. 79-1553

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DEWEY EUGENE COLEMAN,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

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The respondent, State of Montana, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Montana Supreme Court's opinions in this case. The opinions are reported at 579 P. 2d 732 and 605 P. 2d 1000.

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REASONS WHY THE WRIT SHOULD BE DENIED

1. The petition is not timely filed with respect to issues raised and disposed of in petitioner's first appeal.

As part of his shotgun approach petitioner seeks review of issues addressed in the opinion of the Montana Supreme Court dated July 10, 1978, which opinion affirmed petitioner's three convictions and remanded to the district court for resentencing in two counts. Specifically, petitioner is foreclosed from raising issue no. 3 which was addressed and disposed of in the first appeal. Sup. Ct. R. 22. *United States ex rel. Coy v. United States,* 316 U. S. 342 (1942).

2. The petition does not raise a substantial federal question which has not heretofore been decided by this Court.

Petitioner cannot distinguish *Dobbert v. Florida,* 432 U. S. 282 (1977), which disposes of the arguments he proposes in support of issue no. 1. The fact that Dobbert's crimes antedated this Court's ruling in *Furman v. Georgia,* 408 U. S. 238 (1972), whereas petitioner's crimes were committed after Montana had enacted a post *Furman* mandatory death penalty act, leads to the conclusion that Montana's position is even stronger than was Florida's in *Dobbert.*

Petitioner's double jeopardy claim in issue no. 2 is controlled by *Williams v. Oklahoma,* 358 U. S. 576, 586 (1959). Again, Montana's position is stronger in that petitioner was convicted of both offenses simultaneously. Even if double jeopardy principles apply the state may

elect which crime it will prosecute and there is no rationale that would support compelling Montana to elect the crime for which the lesser punishment was imposed.

Petitioner's contention in issue no. 4 is similar to that made and rejected in *Proffitt v. Florida,* 428 U. S. 242, 252 (1976). Although this Court has found jury sentencing to be constitutionally permissible, it has rejected the contention that jury sentencing is mandatory.

Montana's death penalty statutes challenged in issue no. 5, pass muster under *Gregg v. Georgia,* 428 U. S. 153 (1976); *Proffitt v. Florida,* 428 U. S. 242 (1976); and *Jurek v. Texas,* 428 U. S. 262 (1976); and do not offend the principles established in *Lockett v. Ohio,* 438 U. S. 586 (1978). Montana's capital punishment statute regarding mitigating circumstances directs the court to consider "[a]ny other fact [which] exists in mitigation of the penalty." Section 46-18-304, Montana Code Annotated. (Petitioner's Appendix P. 145.)

Gregg, as well as *Proffitt* and *Jurek,* dispose of petitioner's issue no. 6 in that this Court has left the scope of comparison of similar cases involving the death penalty largely up to the states. In *Gregg,* this Court specifically rejected contentions that the Georgia Supreme Court was required to include in its comparison either non-appealed capital cases in which life sentences were imposed or homicides in which capital convictions were not obtained. Montana's small population simply dictates that the number of comparable cases will be small.

Petitioner's argument in issue no. 8 does not raise a burden of proof question but rather a definition of crime question already decided by this Court in *Patterson v.*

New York, 432 U. S. 197 (1977). Defining knowledge as an awareness of probable consequences is consistent with modern concepts of intent. *United States v. United States Gypsum Co.,* 438 U. S. 422 (1978). The state is still required to prove knowing conduct beyond a reasonable doubt. Finally, the inference described in the disputed jury instruction under issue no. 8 is purely permissive in the sense described in *County Court of Ulster County v. Allen,* — U. S. —, 99 S. Ct. 2213 (1979).

3. Petitioner has raised purely factual issues that have been resolved against him in the court below.

The factual issue raised in issue no. 7 was resolved against petitioner by the Montana Supreme Court. *State v. Coleman,* — Mont. —, 605 P. 2d 1000, 1018 (1979). (Petitioner's Appendix P. 62.)

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CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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